Health Acquisition Corp., d/b/a Allen Health Care Services *and* Community and Social Agency Employees Union, D.C. 1707, A.F.S.C.M.E., AFL–CIO, Petitioner. Case 29–RC–9462

November 30, 2000

DECISION ON REVIEW AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

This case addresses the question of whether record evidence is needed on the appropriateness of a petitioned-for unit, which is not presumptively appropriate, where the Employer refuses to take a position on the issue.

On May 16, 2000, the Acting Regional Director of Region 29 issued a Decision and Direction of Election in which, among other things, he found appropriate a unit of home health aides and personal care aides located at the Employer's facilities in Jamaica, Lindenhurst, and Mount Vernon, New York.

Thereafter, in accordance with Section 102.67 of the National Labor Relations Board's Rules and Regulations, the Employer filed a timely request for review of the Acting Regional Director's decision, contending, inter alia, that the record contains no evidence to support the Acting Regional Director's finding. The Petitioner filed an opposition brief. On July 19, 2000, the Board granted the Employer's request for review solely with respect to the Acting Regional Director's finding that the petitioned-for unit is appropriate.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Having carefully reviewed the record, we conclude, for the reasons set forth below, that the Employer's failure to take a position with respect to the appropriateness of the petitioned-for unit did not obviate the need for record evidence on that issue.

The Employer is a nonacute health care institution engaged in operating licensed home health care agencies that provide paraprofessional health care services to the aged and infirm. The petitioned-for unit consists of the Employer's home health aides and personal care aides located at three of the Employer's facilities, excluding all other employees, registered nurses, licensed practical nurses, bookkeepers, maintenance employees, guards, and supervisors as defined in the Act.

At the hearing, and in its subsequent briefs, the Employer has refused to take a position on whether the petitioned-for unit is appropriate. The Petitioner did not call any witnesses during the hearing. Similarly, the Employer presented no evidence. The only indication in the record that the petitioned-for unit is appropriate is a statement made by the Petitioner's attorney at the hearing that the Employer's aides, unlike the Employer's other nonprofessional employees, work in patients' homes. Consequently, the record contains no direct testimony or other evidence regarding the unit's appropriateness.

In finding the petitioned-for unit in this case to be appropriate although no evidence was introduced, the Acting Regional Director relied on the statement by the Petitioner's attorney to find that the Employer's aides work in clients' homes, whereas other employees work at the administrative facilities.[1] Additionally, the Acting Regional Director, citing *Bennett Industries*, 313 NLRB 1363 (1994), found that evidence regarding the appropriateness of the unit was unnecessary because the Employer failed to take the position that the petitioned-for unit was inappropriate. The Acting Regional Director reasoned that the Employer's refusal to take a position on unit-appropriateness indicated there was no genuine issue in dispute requiring further facts on the issue.[2] We disagree.

Initially, we are faced with the question of whether the Employer's refusal to take a position on the appropriateness of a petitioned-for unit obviates the need for record evidence on that issue. As noted, the Acting Regional Director reasoned that because the Employer did not affirmatively take the position that the unit was inappropriate, the issue was not in dispute and, thus, in accordance with *Bennett Industries*, no further litigation was warranted. The Employer argues that, absent a presumptively appropriate unit, there must be at least a minimal showing of unit appropriateness for the Board to direct an election in that unit. After careful consideration, we find that the Board's holding in *Bennett Industries* does not obviate the need for some showing of unit appropriateness in the instant case.

In *Bennett Industries*, the Board found that when the employer refused to take a position on certain employees' supervisory status, the hearing officer did not err in refusing to allow the employer to introduce evidence on that issue. The Board reasoned that in cases where a party refuses to take a position, in order to effectuate the purposes of the Act, the Board should narrow the issues

[1] The Acting Regional Director also cited *People Care, Inc*., 299 NLRB 875 (1990), as an instance in which the Board has found a unit of home health care aides and personal care aides to be appropriate. However, in that case, the Board simply relied upon the underlying representation case in which, after an evidentiary hearing, the unit was found appropriate. In addition, the unit there was a single facility. By contrast, the instant unit is not confined to a single facility.

[2] There was an earlier representation case involving the same employer and the same union, but a different unit than the one at issue in the instant case. The Acting Regional Director did not rely on the record in the earlier case in making these findings.

and limit its investigation to areas in dispute. 313 NLRB at 1363. The employer's unwillingness to take a position in *Bennett Industries* meant that there was no contention by any party that the disputed employees were in fact supervisors. Thus, the presumption of employee status was unrebutted because the burden of proving supervisory status lies with the party asserting such status. 313 NLRB at 1363. In refusing to take a position, the employer thereby failed to meet its burden of proof. The Board then found that there was no need to take record evidence on the issue, and the Regional Director's conclusion that the petitioned-for employees were presumed to be statutory employees, in the absence of affirmative evidence to the contrary, was correct. See also *Mariah, Inc*., 322 NLRB 586 fn. 1 (1996) (hearing officer did not err in excluding employer's evidence when unit was presumptively appropriate, and employer declined to take a position on the unit); *HeartShare Human Services of New York*, 320 NLRB 1 (1995) (Regional Director did not err in limiting scope of hearing to evidence of changed circumstances since earlier case involved the same employer and petitioner).

In contrast to *Bennett Industries*, and its progeny, no similar burden of proof exists in the instant case as there is no contention that the petitioned-for unit is presumptively appropriate.[3] We find here that because there is no presumption, the appropriateness of the petitioned-for unit remains to be determined notwithstanding that the Employer refused to take a position on the Issue. The issue here is not one involving foreclosure of a party's right to present evidence. Rather, it is the question of presenting some evidence necessary to make a unit determination.

We find that in this case, the Board cannot direct an election without any record evidence on which a finding of unit appropriateness can be grounded. The Board has an affirmative statutory obligation to determine the appropriate bargaining unit in each case. *American Hospital Assn. v. NLRB*, 499 U.S. 606, 611, and 614 (1991). Section 9(b) of the Act provides that:

> The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

The Board may use classifications, rules, principles, and precedents in order to regularize the process, but absent a stipulation, it still must determine the appropriateness of the unit in every case. Notice of Proposed Rulemaking and Notice of Hearing, 52 Fed.Reg. 25144 (1987), reprinted at 284 NLRB 1516, 1519 (citing with approval K. Davis, Administrative Law Text § 6.04, p. 145 (3d ed. 1972)).[4] In making our unit determinations, we "may simply look at the Union's proposed unit and, if it is an appropriate unit, accept that unit determination without any further inquiry." *Country Ford Trucks, Inc. v. NLRB*, 2000 WL 1537983 at *6; 165 LRRM (BNA) 2649 (D.C. Cir. 2000). But, absent a stipulated agreement, presumption, or rule, the Board must be able to find—based on some record evidence—that the proposed unit is an appropriate one for bargaining before directing an election in that unit. Rules and Regulations, Sec. 101.18(a).

As the record here fails to establish the appropriateness of the petitioned-for unit, we must remand this case to the Acting Regional Director so that an adequate factual basis may be determined to support his unit determination.

ORDER

The Acting Regional Director's decision is reversed with respect to the issue on review. This proceeding is remanded to the Regional Director for further action consistent with this decision.

[3] *AVI Foodsystems, Inc*., 328 NLRB 426 (1999) (when the unit sought is presumptively appropriate, the burden is on the employer to show that the unit is inappropriate).

[4] In making unit determinations in cases involving nonacute health care institutions, the appropriateness of the unit must be analyzed under the empirical community of interest test. *Park Manor Care Center*, 305 NLRB 872, 875 fn. 16 (1991); *CGE Caresystems, Inc*., 328 NLRB 748 (1999).